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No. 86-1330

In The
Supreme Court of the United States
October Term, 1986

KATRINA MAXTONE-GRAHAM,
Petitioner,
v.
JAMES T. BURTCHAELL, *et al.*,
Respondents.

RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents James T. Burtchaell, Andrews & McMeel, Inc., and Harper & Row, Publishers, Inc., respectfully oppose the petition for a writ of certiorari. This is a copyright infringement action arising out of the emotionally charged national debate on abortion. The district court granted respondents' motion for summary judgment based on the fair use defense, and the court of appeals affirmed.

The appellate decision in this case reflects a careful and reasoned application of the traditional fair use fac-

tors to the undisputed facts, and does not in any respect represent a departure from the guidelines established by this Court. Indeed, it is the *petitioner* who is attempting to goad the Court into an impractical and unrealistic interpretation of its prior decisions.

In summary, in 1973 the petitioner published *Pregnant by Mistake,* a book consisting entirely of the transcripts of interviews of women who had experienced unwanted pregnancy. In 1982, after *Pregnant by Mistake* had gone out of print, respondent Burtchaell (a Catholic priest and professor of Theology at Notre Dame) published *Rachel Weeping,* a scholarly analysis of the abortion issue from the pro-life standpoint. The scholarly analysis contained in *Rachel Weeping* was supported, in part, by fully attributed quotations from the evidence set forth in *Pregnant by Mistake.*

Petitioner, a prominent pro-choice advocate in the abortion debate, opposed any use of the *Pregnant by Mistake* evidence by opponents of abortion. However, as a scholar writing on the subject of abortion, Father Burtchaell was entitled to quote from this evidence, and at each level the lower courts have correctly concluded that such quotations constitute fair use, applying the traditional fair use factors as codified in section 107 of the Copyright Act. 17 U.S.C. § 107.

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STATEMENT OF FACTS

Pregnant by Mistake

In 1973 Ms. Maxtone-Graham authored a book entitled *Pregnant by Mistake.* The publisher was Liveright & Company of New York. The copyright in *Pregnant by Mistake* was registered on September 19, 1973. (5a)[1]

Pregnant by Mistake consists of the verbatim transcripts of interviews with seventeen women who explain their experiences after having an unwanted pregnancy. Most of these women chose to have abortions, and their stories are centered around their abortion experiences. (127a). All of the interviews were tape recorded and transcribed. (163-168a).

All of the passages in *Pregnant by Mistake* which are identified as quotes from the interviewed women are in fact the actual words used by those women. (173-174a).

Because her goal was to publish a verbatim transcript of the interviews, Maxtone-Graham followed a strictly mechanical editing process in the preparation of *Pregnant by Mistake,* eliminating from the transcripts only idle repetition and chatter, and changing the names of the interviewees to protect their anonymity. (171-172a; 175-178a).

From the day of its publication to the day it went out of print (i.e. from August 31, 1973 to March 31, 1982)

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[1]For purposes of clarity, references to the appendix in the court of appeals wil be made as follows: The page number will appear in parentheses, followed by the letter "a." Citations to the appendix which accompanies the Petition for Certiorari will be made as follows: "Pet. App.", followed by the page number as designated in the Appendix.

2,349 copies of *Pregnant by Mistake* were sold. During the last year of its publication, only one copy of *Pregnant by Mistake* was sold. (129-149a). No copies have been sold since March 1982.

The entire sales history of *Pregnant by Mistake* is as follows:

Period	*Copies Sold*
8/31/73 - 2/28/74	1,931
3/01/74 - 9/30/74	(57)
10/01/74 - 3/31/75	(65)
4/01/75 - 9/30/75	71
10/01/75 - 3/31/76	51
4/01/76 - 9/30/76	69
10/01/76 - 3/31/77	72
4/01/77 - 9/30/77	30
10/01/77 - 3/31/78	64
4/01/78 - 9/30/78	31
10/01/78 - 3/31/79	33
4/01/79 - 9/30/79	35
10/01/79 - 3/31/80	29
4/01/80 - 9/30/80	27
10/01/80 - 3/31/81	27
4/01/81 - 3/31/82	1
TOTAL SALES	2,349

On February 25, 1982, *Pregnant by Mistake* was either out of print or was about to go out of print. (179a). On or about February 25, 1982, Maxtone-Graham obtained from Liveright all publishing rights to *Pregnant by Mistake*. (Complaint, paragraph 10).

Ms. Maxtone-Graham owns a small publishing company and has considered publication of a second edition of *Pregnant by Mistake*, "when I get around to it."

(180a). The publication of *Rachel Weeping* in April 1982 has not impeded any plans for such a second edition. In fact, appellant's own personal priorities ("I have thank you notes to write first, and many, many other things . . .") have prevented publication of a second edition. (181a). If a second edition is published, it will be "a very small printing for people who have requested copies." (180a).

Father Burtchaell and Rachel Weeping

Father Burtchaell is a Catholic priest and a Professor of Theology at the University of Notre Dame. (334a). He has been a faculty member at Notre Dame since 1966.

Rachel Weeping is Father Burtchaell's sixth book. (186a). He first decided to write it in 1976. *Id.* Preparation of the first essay, which is the only one containing quotes from *Pregnant by Mistake,* was complete in August 1978. (193a).

In preparing the first essay contained in *Rachel Weeping,* Father Burtchaell intended "to give a serious analysis of the published accounts of abortion veterans." (189a). The work was intended for a limited and scholarly audience:

> "Granted the length and complexity of the book, I did not expect it would have a popular audience. I expected that people seriously interested in the public debate on abortion—who are relatively few in number —would find the book interesting."

(190a).

In preparing the first essay contained in *Rachel Weeping,* Father Burtchaell quoted from two primary

sources: *Pregnant by Mistake,* and *The Ambivalence of Abortion* by Linda Bird Francke. (126a). His preparation of the first draft of the essay reflects the classic critical analysis of a scholar:

> "First of all, I read attentatively the two books to which I make reference. I then noted recurring themes. I reread the books, identifying passages that bore on those themes. I sketched out on outline. I wrote the first draft longhand, revised it and typed it, thus creating what I call the first draft."

(187-188a).

This first essay is a critical analysis of and commentary upon the evidence assembled by Maxtone-Graham and Francke. At the outset, Father Burtchaell emphasizes the nature and purpose of the essay:

> "What one needs in the case of abortion is an extended visit to the villages, and that is available in Linda Bird Francke's book, *The Ambivalence of Abortion* (New York: Random House, 1978; hereinafter cited as F). After reading it one should pick up its natural supplement, *Pregnant by Mistake,* by Katrina Maxtone-Graham (New York: Liveright, 1973; hereinafter cited as G).
>
> Both books present interviews. Maxtone-Graham had extended conversations with seventeen women, before abortion on demand was legal nationally but after it was permitted in New York. Francke offers about seventy-five interviews. They are briefer, but more varied: with women, men, and couples; before, during, and as much as fifty years after the abortion experience. Both authors are explicitly sympathetic to abortion choice, and succeed in being relatively fair, inobtrusive interviewers."

* * *

> "What makes these two books helpful is that both authors have let the women and men unfold their personal experience of abortion in all its confusion and hurt and courage and isolation. Their stories are rich and varied enough to sustain inquiry beyond (and sometimes athwart) what the interviewers say by way of summary."
>
> * * *
>
> "What Francke and Maxtone-Graham do not offer is any systematic reflection on what their interviewees have told them. Had they undertaken such an analysis, they would have seen emerging—from the veterans of the abortion experience—a profoundly unsettling story. Their documentation of the abortion experience is strong evidence—stronger in some sense than the indictments of antiabortionists—against the portrayal of abortion by its advocates."

(126a at 2-3).

Father Burtchaell considered whether he should paraphrase, rather than quote directly from, the interviews in *Pregnant by Mistake* and *The Ambivalence of Abortion*, but he rejected this idea on scholarly grounds:

> "It was my observation that the literature in the abortion debate was highly contentious and often raised questions of credibility. I had encountered numerous third-party accounts of what other persons had said, which I either discovered or surmised were distorted. I considered it essential for the credibility of my essay that the words of abortion veterans themselves appear."

(201a).

Likewise, he rejected the idea of conducting his own interviews of abortion veterans:

> "I realized that as a Catholic priest I would myself encounter credibility problems. I have had considerable experience with abortion veterans, and I could have set out to do interviews myself. But I considered that it was fairer and likely to be perceived as fairer were I to use only interviews conducted by pro-choice interviewers."

(202a).

Quotations from *Pregnant by Mistake* represent 2.76% of *Rachel Weeping,* and *Rachel Weeping* quotes 4.3% of *Pregnant by Mistake.* (151-152a).[2] All quotations from *Pregnant by Mistake* are clearly cited and fully attributed in *Rachel Weeping.* (126a).

Father Burtchaell's Advance Request to Liveright

Upon completion of the first *Rachel Weeping* essay in August 1978, Father Burtchaell sought in good faith to obtain from Liveright permission to quote from *Pregnant by Mistake.* This request was first made in a letter dated August 17, 1978. (191-2a; 152a). At that time, the first essay of *Rachel Weeping* was complete and could have been reviewed by Liveright. (193a).

---

[2]Petitioner argues that quotations from *Pregnant by Mistake* constitute 19% of the "lead essay" of *Rachel Weeping.* (Pet. at 6). However, the "lead essay" has never been published separately from the entire book, and petitioner's comparison is crudely and unfairly structured to her best advantage. Likewise, petitioner incorrectly states that Father Burtchaell quoted the "heart" of *Pregnant by Mistake.* (Pet. at 6). Petitioner did not advance such a proposition in either the district court, or the appellate court. A simple review of *Pregnant by Mistake* reveals no identifiable core, and the court of appeals correctly so concluded. (Pet. App. at 20a). Petitioner is desperately contorting the record to bring herself closer to decisions such as *Harper & Row, Publishers, Inc. v. Nation Enterprises, infra.*

Father Burtchaell was told that he must furnish Liveright with detailed financial and production information before permission would be granted. (194a). He did so in June 1981 when the requested financial and production information was first available. (195a). Although he had, at the request of Liveright, submitted an advance copy of his book in early August 1981, he was informed for the first time in early November 1981 by Liveright that "Maxtone-Graham had some reluctance to Liveright granting the permission requested." (336a).

Subsequently, on November 4, 1981 Mary Ryan of Liveright telephoned Father Burtchaell and informed him that Maxtone-Graham "was opposed to" his having permission to quote from *Pregnant by Mistake,* "and that without her agreement, Liveright would not wish to grant" permission. (196a). Father Burtchaell responded:

> "I, once again, objected to having been entrapped in an impossible situation. I asked if I might speak with the author, and I was refused that. I then asked if I might correspond with her to make another appeal, and I was refused that. But then Ms. Ryan agreed that if I were to write through the press, she would agree to forward the letter to the author. I reminded her also, once again, of how long the book had proceeded in production. It was then that I wrote the letter of November 6."

(196a).

On November 6, 1981, Father Burtchaell sent a lengthy letter to Maxtone-Graham in care of Liveright. (155a). He outlined in detail the history of *Rachel Weeping*, and of his requests to Liveright. He attempted to persuade Maxtone-Graham that she should not oppose quotation of the

evidence in *Pregnant by Mistake*. He closed with the following:

> "The method of your book was essentially reportorial. You interviewed well, gave the people their say, and presented it in print as they had explained themselves. For another writer to come along afterwards and offer comment on the interviews seems to be not only acceptable but desirable. I am not contradicting your analysis, because you did not wish to do that kind of book. In fact, you would not have published the interviews had you not considered them challenging and thoughtful. It seems to me that an analysis of them, and a comparison with the Francke material, is a very natural sequel to your work, and one that you would welcome. That you and I may have diverging ethical judgments about abortion should not stand in the way of open, professional discourse on the subject.
>
> "So I appeal to you on two grounds. First, I have tried to write a serious and fair analysis of a subject on which you have published some evidence. Second, my publication schedule is such that your refusal at this late date seems very unreasonable. Had you asked to review my essay 39 months ago, I would have had options open that are no longer available now that I am two months from publication. I have acted in completely good faith. I assume that you have done the same, but had Liveright and you intended to deal with me in bad faith I do not know what you could have done to make things worse."

(155a).

Maxtone-Graham responded by letter to Father Burtchaell on December 7, 1981. She stated unequivocally that she was opposing permission in order to prevent the use

of portions of *Pregnant by Mistake* in any book that did not adhere to the "pro-choice" line. (158a).[3]

Father Burtchaell then consulted with his editor at Andrews & McMeel, Inc.:

> "I am sure that I reviewed the recent correspondence and my perplexity. She indicated that she would contact legal counsel. Another telephone conversation followed her communication with legal counsel in which she explained to me . . . without technicalities, what the Fair Use Doctrine was, and indicated that in the opinion of counsel I had firm ground to proceed even without permission; although we would have preferred to have received it, and to have paid an appropriate fee as had been the case with the other publisher, author, and book."

(197-198a).

Early in December, 1981, Father Burtchaell reviewed the page proofs for *Rachel Weeping* and returned them to Andrews & McMeel on December 9, 1981. (200a). *Rachel Weeping* was published on April 1, 1982. (200-201a).

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[3]Maxtone-Graham now seeks to characterize her refusal as based upon alleged "misquotations" by Father Burtchaell. (Pet. at 5). This is a flat misstatement—her letter nowhere mentions or even implies "misquotations." (158a). The real reason for her refusal is clear and, until now, undisputed. She simply did not want Father Burtchaell to use any portion of *Pregnant by Mistake* to make arguments against abortion.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE COMMERCIAL USE FACTOR

Petitioner's first argument focuses on the appellate court's evaluation of "the purpose and character" of Father Burtchaell's quotation from *Pregnant by Mistake*. (Pet. at 12-18). This, of course, is one of the factors to be considered in the fair use analysis, and it includes an assessment of whether the "use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). It is the commercial element of section 107(1) which is the basis of petitioner's argument. She states that the court of appeals "unabashed[ly] refus[ed]" to recognize the presumption that a commercial use is not a fair use, and that it devised a "newfangled test," under which the issue is whether the commercial or the educational elements of a work predominate. (Pet. at 14-15).

Such hyperbole readily dissolves upon a brief examination of the appellate decision and the recent decisions of this Court. In *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 448-49, 451 (1984), this Court held that "every commercial use of copyrighted material is presumptively an unfair exploitation," but specifically cautioned that this presumption is "not conclusive." In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985) the Court quoted the above language, with the following specific proviso: "The fact that a publication was commercial as opposed to non-profit is a separate factor that *tends* to weigh against a finding of fair use." (Emphasis Supplied)

The court of appeals expressly recognizes and applies these guidelines: "Of course, even a minimal level of com-

mercial use weighs against a finding of fair use, but whether it affects the ultimate determination depends on the totality of factors." (Pet. App. at 18a). Further, the court recognizes the practical reality that "the commercial nature of a use is a matter of degree, not an absolute . . ." *Id.* At one end of the spectrum is the appropriation by a mass market national magazine of the right of first publication of a public figure's memoirs. At the other end of the spectrum is a scholar's quotation from an out of print book for use in a limited circulation treatise on abortion. Both uses have commercial aspects. However, in the former instance the commercial factors predominate, while in the latter commercial factors are clearly secondary.

The court of appeals recognizes this practical distinction, and refuses to adopt petitioner's attempt to impose a black-or-white, pigeonhole analysis of the fair use factors:

> "We do not read Section 107(1) as requiring us to make a clear-cut choice between two polar characterizations, "commercial" and "non-profit." Were that the case, fair use would be virtually obliterated, for "[a]ll publications presumably are operated for profit . . ." [Citation omitted.]

(Pet. App. at 18a). Thus, the court of appeals does not "construe *Sony* into oblivion," nor does it establish a "newfangled test." Rather, it recognizes *Sony's* rebuttable presumption regarding commercial uses, and it also recognizes *Sony's* cautionary language placing this presumption squarely into the context of the other fair use factors.

The appellate court also correctly observes that the commercial use presumption is only one part of the sec-

tion 107(1) analysis. In evaluating the first fair use factor, the Copyright Act calls for an assessment of "the purpose and character of the use, *including* whether the use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. 107(1). (Emphasis supplied). Thus, the court of appeals correctly assesses the nature of Father Burtchaell's work in the context of section 107(1): "While *Rachel Weeping* involved some commercial aspects, it was first and foremost an essay expressing a certain point of view on the abortion issue." (Pet. App. at 18a).

II.

THE COURT OF APPEALS CORRECTLY EVALUATED RACHEL WEEPING'S LACK OF EFFECT ON THE MARKET FOR PREGNANT BY MISTAKE

Petitioner's second point is that the court of appeals ignores *Sony's* presumption of future harm to the market for a work, when the allegedly infringing work is commercial in nature. (Pet. at 18-21). However, it is petitioner who has ignored the compelling evidence on this point. In short, this evidence was as follows:

a. *Pregnant by Mistake* was out of print before *Rachel Weeping* was published. (179a).

b. Petitioner's "thank you" notes were a more significant impediment than *Rachel Weeping* to a second edition of *Pregnant by Mistake*. (180-81a).

c. On its face, *Pregnant by Mistake* is reportorial in nature, as contrasted with *Rachel Weeping's* critical analysis. The books serve markedly different functions.

d. *Pregnant by Mistake* is avowedly pro-choice, while *Rachel Weeping* is avowedly pro-life. The books are directed to markedly different audiences.

In response to this evidence, petitioner offered *no* evidence whatsoever. This, of course, is fatal to a party opposing summary judgment. See, Wright, Miller & Kane, *Federal Pratice and Procedure 2d*, § 2739.

Recognizing this deficiency, petitioner's lawyers in this Court now offer the absurd speculation that *Rachel Weeping* could be seen by the public as a substitute for *Pregnant by Mistake*. (Pet. at 21). It is difficult to understand how this could be so, in light of the vastly different functions which the books serve, and in light of the vastly different markets to which they are directed. Moreover, petitioner made no effort whatsoever to present *evidence* in support of the dubious proposition which she now advances. Respondents offered clear evidence of the lack of market harm, and they thus overcame the *Sony* presumption.

The court of appeals questions whether the *Sony* presumption applies here, in light of its conclusion that "the noncommercial elements of *Rachel Weeping* overwhelm its commercial aspects . . . ." (Pet. App. at 21a). However, petitioner failed to counter the evidence of lack of market harm, and the court therefore saw no need to address the issue:

> "Fortunately, we need not settle that issue here, for whether we presume harm, or search for proof of it, it is abundantly clear that *Rachel Weeping* poses no more than an insignificant threat of economic damage to Maxtone-Graham."

(Pet. App. at 21a). The court then proceeded to catalog the evidence indicating no economic damage, noting that petitioner offered no countering evidence, and ruling the point in favor of respondents. (Pet. App. at 21-22a).

III.

THERE IS NO TRIABLE ISSUE OF FACT AS TO THE VOLUME OF QUOTATION

Petitioner's final point is that there remain genuine issues of material fact as to the volume of quotation, and as to the alleged "errors and distortions" contained in Father Burtchaell's work. (Pet. at 21-24). However, the facts as to the number of words quoted are undisputed (although petitioner crudely attempts to skew the percentage comparisons in her favor by carving out one essay in *Rachel Weeping* for comparison to her entire book). Moreover, even construing the allegations of "error and distortion" (which would not be unexpected in the emotionally charged abortion debate) in petitioner's favor, the appellate court correctly concludes that such "errors" do not foreclose the fair use defense, especially in light of the court's evaluation of the other fair use factors. (Pet. App. at 16a).

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CONCLUSION

Petitioner has not demonstrated that this case presents issues worthy of review by this Court on certiorari. The decision of the court of appeals is entirely proper, and is fully in accord with this Court's decisions in *Sony* and *Harper & Row*.

The petition itself reveals why respondents prevailed in the district court and in the court of appeals—petitioner is attempting to overcome compelling evidence with nothing more than presumptions and speculation. This is not a case for certiorari.

Respectfully submitted,

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